

**Pueblo of Laguna Redline Revision of
Proposed Department of the Interior
Tribal Consultation Policy
July 18, 2011**

43 C.F.R. PART ____—TRIBAL CONSULTATION

I. Preamble-§ ___.1 Policy and scope.

(a) The ~~obligation~~ **legal requirement** for Federal agencies to engage with Indian Tribes on a government-to-government basis is based on the U.S. Constitution, treaties, statutes, **case law**, executive orders, and policies. Federal agencies meet that ~~obligation~~ **requirement in part** through **meaningful** consultation with Indian Tribes. The Department of the Interior is committed to fulfilling its Tribal consultation obligations--whether directed by statute, **case law**, or administrative action such as Executive Order (EO) 13175 (Consultation and Coordination with Indian Tribal Governments) or other applicable Secretarial Orders or policies--by adhering to the framework described in this ~~Policy~~**Part**, **and the relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples**. This ~~Policy~~**Part** reflects the Department's highest commitment to the principles embodied in this Policy, ~~and the Secretary's support of Tribal sovereignty, and the Department's fiduciary duties to Indian Tribes.~~

(b) The Department's Bureaus and Offices shall review their existing practices and revise them as needed to comply with ~~the Department's Policy as described in this document~~**Part**. All Bureaus and Offices will report to the Secretary's designee on their efforts to comply with this ~~Policy~~**Part** and as described in a companion Secretarial Order.

II. § ___.2 Guiding Principles

(a) This ~~Policy~~**Part** broadly defines provisions for improving the Department's consultation processes with Indian Tribes to the extent that a conflict does not exist with applicable law or regulations. The Department recognizes and respects the distinct, unique, and individual cultural traditions and values of each Tribe. **The Department has long-standing and inter-governmental relationships with and strict fiduciary duties to Indian Tribes. In addition, Indian Tribes have inherent sovereign powers over their members and territory, and have a right to self-government and self-determination. These fundamental principals guide the Department's consultation policy.**

(b) This ~~Policy~~**Part** requires that the Department's government-to-government consultation involve the appropriate Tribal Officials and appropriate Departmental officials. The appropriate Departmental officials are knowledgeable about the matters at hand, are authorized to speak for Interior, and have delegated authority in the disposition and implementation of an action. The appropriate Departmental official will ~~have an obligation~~ **be required** to identify consulting parties **as early as possible** in the planning process and allow a reasonable opportunity for Indian Tribes to respond and participate as described in Section VII. Department officials will ~~make the effort~~ **be required** to fully participate in the consultation process, ensure continuity, and demonstrate commitment to the process. Communication will be open and transparent without compromising the rights of federally recognized Indian Tribes and the government-to-government consultation process.

(c) Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making where all parties share a goal of reaching a decision together and it creates an opportunity

for equal input from all affected tribal governments. Consultation promotes an enhanced form of communication that emphasizes trust, respect, and shared responsibility and should be an open and free exchange of information. Federal consultation that is meaningful, effective, and conducted in good faith makes the Department's operation and governance practices more efficient. To that end, Bureaus or Offices will seek and promote cooperation and participation between agencies with overlapping jurisdiction, special expertise, or related responsibilities regarding a Departmental Action with Tribal Implications. Efficiencies that derive from including Indian Tribes in all stages of the Tribal consultation process and decision-making process help to ensure that future Federal action is achievable, comprehensive, long-lasting, and reflective of Tribal input.

~~(d) The United States has a long-standing and inter-governmental relationship with Indian Tribes. Appropriate consultation practices will honor the government-to-government relationship between Indian Tribes and the United States; will help ensure compliance with the United States' fiduciary duties to Indian Tribes; and will comply with the Presidential Memorandum of November 5, 2009 that affirms this relationship and obligates the Department of the Interior to meet the spirit and intent of EO 13175.~~

~~Theis Policy~~**Part** creates a framework for synchronizing the Department's consultation practices with its Bureaus and Offices.

~~III.~~§ **___**.3 Definitions

Bureau or Office--As defined in the Department of the Interior Manual.

Collaboration--The Department of the Interior working jointly with Indian Tribes to develop and implement positive solutions on Departmental Action with Tribal Implications.

Consultation Policies--Those institutionalized policies established to comply with the procedures described in Section VII of this document.

Departmental Action With Tribal Implications--Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, grant funding formula changes, or operational activity that may have a substantial direct effect on an Indian Tribe, including but not limited to:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on Federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members; an Indian Tribe's relationship with the Department; or
3. The distribution of responsibilities between the Department and **an** Indian Tribes.

This term does not include matters that are the subject of litigation or in settlement negotiations, or matters **that are** undertaken in accordance with an **formal** administrative or judicial order where the Department has no discretion with respect to consultation.

Substantial Direct Effect--This is used in the context of defining what actions have Tribal Implications.

1. **Substantial. To determine if an action is substantial, the action must be analyzed in several contexts such as a whole, the affected tribal region(s), the affected tribal interest(s), and the locality.**

Such a determination must be made recognizing the unique interests and relationships of Indian tribes. Both short- and long- term effects must be considered.

2. Direct Effect. This refers to the impact of the action on tribal interests. To determine if an impact will have a direct effect on tribal interest(s), the following should be considered:
 - a. Impacts can be beneficial and adverse. Even beneficial impacts have a direct effect on tribal interest(s).
 - b. The degree proposed action affects the health, safety, and unique needs of Indian Tribes (i.e., religious).
 - c. The unique characteristics of the geographic area (i.e, proximity to historical and cultural resources).
 - d. The degree to which the effects on tribal interest(s) are likely to be controversial, uncertain, or involve unique and/or unknown risks.
 - e. The degree to which the effects may establish precedent for future actions with direct effects or represents a decision in principal about a future consideration.
 - f. Whether the action is related to other actions that cumulatively have a direct effect on tribal interests.

Indian Tribe or Tribe--Any Indian or Alaska Native Tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian Tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

Tribal Consultation Team--The Secretary's designee has established and may develop a plan of action for the continued involvement of a joint Federal-Tribal Team including making recommendations on the implementation of this Policy.

Tribal Governance Officer (TGO)--An individual designated by the Department to carry out responsibilities defined in this Policy.

Tribal Liaison Officer (TLO)--One or more individuals designated by their Bureaus or Offices to carry out responsibilities defined in this Policy.

Tribal Official--An Elected or appointed Tribal leader or official delegate designated in writing by an Indian Tribe.

IV. § __.4 Accountability and Reporting

(a) Methods that ensure accountability and reporting are essential to regular and meaningful consultation. The heads of Bureaus and Offices will include in future annual performance plans of their employees appropriate performance measures consistent with this PolicyPart.

(b) On an annual basis, Bureaus and Offices shall report to the Secretary the results of their efforts to promote consultation with Indian Tribes. Reporting is intended to be comprehensive and may include, but is

not limited to, the scope of consultation efforts, the cost of these efforts, and the effectiveness of consultation activities. Bureaus and Offices should provide a comprehensive listing of the topics on which consultations were held, training, innovations, and the engagement of senior leadership in these efforts. Such reports should include feedback from Tribes with whom the Bureau or Office has consulted. Reports will account for the documents and correspondence with Indian Tribes to satisfy the Implementation of the Final Federal Action Stage described in Section ~~VH~~ .7 or alternatively, summaries of such documents and correspondence with information concerning how the complete documents might be obtained. Methods of reporting may be a description of budget expenditures in the execution of consultation efforts, narratives describing significant consultation efforts, and anticipation of forthcoming consultation opportunities.

(c) The Secretary of the Interior will provide an annual report to Indian Tribes and may use the Department's website to share the reporting information, where appropriate.

(d) For Federal block grants that only Indian Tribes are eligible to receive and in compliance with Federal statutes, a Bureau or Office will take special care to disclose actions it has taken to consult with Indian Tribes in the development of formulas to administer the block grants.

~~V~~.§ .5 Training

Training will aim to improve the Department's capacity for promoting collaboration with Tribes and executing the consultation provisions of Section ~~VH~~ .7.

The training will:

~~A~~.(a) Promote consultation, communication, collaboration, and other interaction with Tribes;

~~B~~.(b) Outline and reinforce the Department's duties concerning tribal interests;

~~C~~.(c) Describe the legal trust obligations **and duties** of the Federal-Tribal relationship; and

~~D~~.(d) Transfer the knowledge, skills, and tools necessary for collaborative engagement to Tribal and Departmental staff engaged in the consultative process.

The Department, through the Department of the Interior University (DOIU), in collaboration with Bureaus, Offices, Tribal colleges and universities, and other entities with Indian expertise, will develop and deliver training. The Department, through the DOIU, will develop required core competencies, which Bureaus and Offices may enhance through other appropriate sources of tribal expertise.

This training will seek to enhance mutual understanding of cultural perspectives and administrative requirements between Tribal and Federal officials and to promote inter-governmental relationships. Tribal representatives are encouraged to participate in training along with federal employees.

~~VI~~.§ .6 Innovative and Effective Consultation Practices

The Department's leadership will strive to advance Federal consultation practices and to offer examples for innovation across the Administration. The Department will identify and seek to address impediments, both external and internal, to improving its consultation processes.

In consultation with Tribes, the Department will develop a plan of action for the continued improvement of this policy and its implementation. This plan may include:

- ~~A.~~(a) Annual meetings between the Secretary and Tribes;
- ~~B.~~(b) Communicating through a regular gathering of Tribes to discuss improving consultation practices and procedures;
- ~~C.~~(c) Institutionalizing a joint Tribal-Federal consultation team that would meet periodically to identify improvements;
- ~~D.~~(d) Soliciting Tribes' evaluation of consultation practices and procedures.

~~VII.~~§ ~~___~~.7 Consultation Guidelines

Consultation guidelines are meant to establish uniform practices and common standards, which all Bureaus and Offices will use except when otherwise agreed to in writing by a Bureau or Office and Indian Tribe through an individual protocol conforming, to the extent possible, to the guidelines in this Section. Consultation and individual protocols will provide greater efficiency and transparency in Department practices in order to maximize Indian Tribes' participation. Departmental Actions with Tribal Implications that are regional or impact a limited number of Indian Tribes should be carried out in a manner consistent with this ~~Policy~~**Part** while allowing discretion to employ only appropriate parts of this Section.

~~A.~~(a) Initiating Consultation. A Bureau or Office must notify the appropriate Indian Tribe(s) of the opportunity to consult when considering a Departmental Action with Tribal Implications. **Such notice will be provided well in advance of any Departmental Action with Tribal Implications.** The Bureau or Office will strive to ensure that a notice is given at least 30 days prior to a scheduled consultation. If exceptional circumstances prevent notice within 30 days of the consultation, explanation for the abbreviated notification will be provided in the invitation letter. An Indian Tribe may request an extension for timelines associated with this ~~Policy~~**Part**.

Adequate notice entails providing a description of the **tribal implications stemming from Departmental Action**, topic(s) to be discussed, a timeline of the process, and possible outcomes. Notification of a consultation should include sufficient detail of the **Departmental Action and topic(s)** to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation. **The Department recognizes that public information meetings and mere invitation to consult do not amount to meaningful government-to-government consultation. In addition, meaningful consultation is not determined by mere pro forma recitals, or the sheer volume or size of documents or the number of letters, reports, or meetings.**

Beginning at the Initial Planning Stage, see Section ~~VII, Part E, Subsection 1~~ **___**.7(e)(1), a Bureau or Office will consult with Indian Tribes on a Departmental Action with Tribal Implications.

In addition to the Department notifying affected Indian Tribes, an ~~An~~ Indian Tribe **may also** request that the Department initiate consultation when the Tribe believes that a Bureau or Office is considering a Departmental Action with Tribal Implications. Requests should be made in writing to the Department's TGO and describe the specific Departmental Action with Tribal Implications. However, the fact that an Indian Tribe may choose not to engage the TGO does not relieve a Bureau or Office of its obligation to engage in consultation as described by this ~~Policy~~**Part**. In the event that the Bureau or Office makes an attempt to initiate consultation and does not receive a response, the Bureau or Office should make reasonable and

periodic efforts throughout the process to repeat the invitation. Reasonable efforts should be made to adequately document or memorialize these communications.

~~B.~~(b) Role of Tribal Governance Officer and Tribal Liaison Officer in Consultation Process.

~~1.~~(i) The Department will designate a TGO who will be located within the Department so that the position shall be accessible to Tribal Officials and so that the TGO will have access to the Secretary or Deputy Secretary to carry out the responsibilities defined in this Policy. These responsibilities shall include:

- a. Monitoring compliance with this ~~Policy~~Part, EO 13175, and other Consultation Policies pertaining to government-to-government consultation;
- b. Serving as the Secretary's representative when requested to do so in matters pertaining to consultation;
- c. Promoting government-to-government consultation;
- d. Communicating and coordinating with TLOs concerning Bureau and Office compliance with this ~~Policy~~Part;
- e. Encouraging Indian Tribes to request consultation directly with the appropriate Bureau or Office representative or the TLO, and helping to ensure the resolution of all requests;
- f. Implementing, in coordination with the TLOs, a reporting system to ensure that consultation efforts are documented and reported to the Secretary and to the Department's TGO for EO 13175; and
- g. Facilitating a government-to-government relationship that is honored by all parties in tribal consultations of national significance or involving multiple Bureaus or Offices.

~~2.~~(ii) Each Bureau or Office will designate one or more TLOs whose responsibilities shall include:

- a. Working with their Bureaus or Offices to achieve compliance with this ~~Policy~~Part, the Consultation Policies of their Bureaus or Offices, and any future policies related to EO 13175 or other government-to-government consultation policies;
- b. Promoting and facilitating consultation and collaboration between Tribes and the TLOs' Bureau or Office;
- c. Advocating for opportunities for and consideration of positions of Indian Tribes, consistent with Bureau and Office missions;
- d. Serving as the principal point of contact for the TGO concerning compliance with this ~~Policy~~Part, including Bureau and Office reporting requirements;
- e. Striving to enhance trusting and on-going relationships with Tribes, consistent with applicable law and executive orders;
- f. Serving as an initial contact for Tribes requesting or inquiring about consultation when it is unclear whom to contact for the Bureau or Office; and

g. Carrying out other responsibilities as assigned by Bureau or Office Consultation Policies.

3. Publicize TLOs and TGO--Each Bureau or Office shall take appropriate measures to publicize the name of the TGO and the names and contact information of their TLO(s) to facilitate contacts by tribal officials.

~~C.~~(c) Guidelines for Response to Request for Consultation. The TGO or appropriate representative will confirm receipt of a request for consultation from a Tribal Official. When the request is directed to the TGO, the request is to be forwarded to the appropriate Bureau or Office. The TGO or appropriate representative will treat an official request for consultation in an expedited fashion and respond in writing, using the most expedient methods to communicate to the Tribe, that the Department has received their request.

~~D.~~(d) Consultation Process Support. The Office of Collaborative Action and Dispute Resolution can assist in planning or facilitating an effective consultation process, negotiated rulemaking or other collaborative approach to decision-making. In planning consultation processes as outlined below in ~~Paragraph E~~ **subsection (e)**, Bureaus and Offices are encouraged to consider best practices for engagement, including but not limited to the use of neutral facilitation and other collaborative problem-solving approaches to promote effective dialogue and conflict resolution.

~~E.~~(e) Stages of Consultation. Bureaus and Offices will carry out the stages described below in order to satisfy consultation for a Departmental Action with Tribal Implications. **At the conclusion of each of the following stages, the Department will send potentially affected Indian Tribes a written summary of the Department's findings with respect to that particular stage.**

~~1.~~(i) Initial Planning Stage.

Each Bureau or Office will consult ~~as early as possible~~ **well in advance** when considering a Departmental Action with Tribal Implications. A Bureau or Office may conduct a meeting or other forms of interaction with Indian Tribes in order to receive and evaluate comments received as part of the Initial Planning Stage, **but such initial interactions alone is not consultation as defined in this policy.**

~~2.~~(ii) Proposal Development Stage.

The Proposal Development Stage begins once the Department discloses the scope of a Departmental Action with Tribal Implications. Indian Tribes should be considered as appropriate collaborative partners, particularly where negotiated rulemaking or a Tribal Leader Task Force is created.

The Bureau or Office will select a process, **with the affected Indian Tribe(s)' written consent**, for the Proposal Development Stage that maximizes the opportunity for timely input by Tribes and is consistent with both Tribal and Bureau schedules. The Bureau or Office should work with Indian Tribes to structure a process, which to the extent feasible, considers specific Indian Tribal **locations**, structures, traditional needs, and schedules of the Tribes. ~~and may proceed with the expectation that interested Indian Tribes will respond within a reasonable time period.~~ If litigation or legal requirements impact a Bureau's or Office's schedule for conducting consultation, then the Bureau or Office should explain these constraints to the Indian Tribe.

Examples of appropriate processes for the Proposal Development Stage include but are not limited to the following:

Negotiated Rulemaking. Where appropriate, the Bureau or Office should consider using negotiated rulemaking for developing significant regulations or other formal policies in accordance with the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act.

Tribal Leader Task Force. A Tribal Leader Task Force may be used, in appropriate circumstances, **with written tribal consent**, on regional or issue-specific (e.g., timber) matters. In each instance, the composition of the Task Force shall be ~~collaboratively~~ **exclusively** determined **and approved** by the Tribes, provided that the Task Force shall be a process open to all Tribes and, to the extent possible, represent a cross-section of Tribal interests with respect to the matter at issue. The location and number of meetings to be held will conform to the expressed views of the Tribes, to the extent practicable and permitted by law and in accordance with FACA. **While a Tribal Leader Task Force may be used in certain instances, the Department recognizes that it is preferable to consult with each Tribe in a government-to-government manner through its own representative institutions.**

Series of Open Tribal Meetings. The Bureau or Office may provide open invitations to Tribal leaders as part of a series of open meetings to consider action(s). Open meetings can be used for national, regional or subject-matter-specific issues. **Such meetings alone are not considered government-to-government consultation, but can be helpful to the overall consultation process.**

Single Meetings. **The Department recognizes that it is preferable to consult with Indian Tribes at tribal governmental headquarters. However,** The Bureau or Office may host Tribal Officials in a single meeting to discuss a Departmental Action with Tribal Implications under consideration. Single meetings are particularly appropriate for local, regional, or single Tribe issues.

The Bureau or Office will solicit the views of affected Tribes regarding the process timeline to meaningfully consider a Departmental Action with Tribal Implications. The Bureau or Office should make all reasonable efforts to comply with the expressed views of the affected Tribes regarding the process timeline at this Stage, taking into account the level of impact, the scope, and the complexity of the issues involved in the Departmental Action with Tribal Implications, along with the other factors driving the schedule. The **entire** process will be open and transparent.

If the Bureau or Office determines that the Administrative Procedure Act or other Federal law or regulation expressly prohibits continued discussion at a specified point in the decision-making process, the Bureau or Office should so inform the Tribes at the outset of this Stage in the process.

3-(iii) Implementation of Final Federal Action Stage.

In addition to any formal notice required by law or regulation, final decisions on Departmental Action with Tribal Implications should be communicated in writing to affected Tribes, with a summarized explanation of the final decision.

A Bureau or Office may consider implementing a post-consultation review process where it is consistent with law, regulations, and EO 13175. Any review process shall not limit the Department's deliberative process privilege regarding internal considerations or any other applicable privilege. The Bureau or Office at this Stage will consider the need for training or technical assistance.

F-(f) Impact of Consultation Guidelines. Consultation as described in this Section is not a basis for the Department to preclude requests or recommendations by Bureaus, Offices, or Indian Tribes to collaborate and foster trusting relationships between the Department and Indian Tribes outside of the processes described

in this Section. Exigent circumstances may allow the Department to take measures that deviate from this PolicyPart, but the Department should make every effort to comply and should explain to Indian Tribes as soon as exigent circumstances arise. **In addition, agencies must encourage Indian tribes to develop their own policies to achieve program objectives, defer to Indian tribes to establish standards where possible, and consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.**

~~VIII.~~§ ____ .8 Supplemental Policies

Bureaus and Offices, in collaboration with the TGO, are to review existing policies that may be impacted by this PolicyPart. All Bureau and Office policies are to conform to this PolicyPart. Where necessary, a Bureau or Office may develop a new policy in order to conform to this PolicyPart.

Consistent with Federal appropriations law, the Department shall develop a policy for consultation with Alaska Native Corporations. The Policy will address when a Department action impacts an Alaska Native Corporation's interest. The Policy will not conflict with the requirements of this documentPart. The Secretary's designee will provide a Plan of Action for developing the Alaska Native Corporation consultation policy. Other entities that are not Bureaus or Offices as defined in this PolicyPart may develop policies that conform to this PolicyPart. Other entities may develop such policies in coordination with the TGO.

IX. Disclaimer

~~—Except to the extent already established by law, this Policy is intended only to improve the internal management of the Department, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the Department or any person. The Department also does not waive any applicable privilege that it may hold by virtue of this Policy.~~